93-427

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JANET G. CLOWES,

Petitioner,

v.

ALLEGHENY VALLEY HOSPITAL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Did the Third Circuit Court of Appeals err when it, in effect, applied a *de novo* standard of review to a jury's finding that petitioner was constructively discharged because of her age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621–34?

2. Does the Third Circuit's decision conflict with this Court's holding in *Pullman–Standard v. Swint*, 456 U.S. 273 (1982)?

3. Did the Third Circuit Court of Appeals err in failing to give proper deference to the jury's verdict in petitioner's favor as required by the Seventh Amendment and this Court's precedents?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Janet G. Clowes respectfully prays that a writ of certiorari issue to review the judgment and opinion and amended opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on April 23, 1993 and May 27, 1993, respectively.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit issued on April 23, 1993 and amended by Order Amending Slip Opinion dated May 27, 1993, is reported at 991 F.2d 1159 (3d Cir. 1993), and is reprinted in the appendix attached hereto at 9a, *infra*. On May 27, 1993, the opinion was amended by the unpublished Order Amending Slip Opinion, reprinted in the appendix attached hereto at 7a, *infra*.

The unpublished, unamended slip opinion of the Court of Appeals for the Third Circuit issued on April 23, 1993, is reprinted in the appendix attached hereto at 1a, *infra*.

JURISDICTION

Federal jurisdiction in the trial court was invoked under 28 U.S.C. § 1331 and 29 U.S.C. § 626. The decision of the Court of Appeals sought to be reviewed was issued on April 23, 1993. A timely petition for rehearing was filed on May 5, 1993. The April 23, 1993 opinion was amended by order dated May 17, 1993. The petition for rehearing was denied by order of the Court of Appeals on June 16, 1993. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTE AND RULE

Plaintiff's claim arises under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621-34:

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 623. Prohibition of age discrimination

(a) *Employer practices*

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Fed. R. Civ. P. 50(a) provides in pertinent part:

(a) *Judgment as a Matter of Law.*

(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

STATEMENT OF THE CASE

Petitioner Janet Clowes is a sixty year old nurse. She worked for the respondent in both part-time and full-time positions for thirty years, from 1957 until 1987. In 1989, she instituted this action seeking redress under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621-34, alleging that she was constructively

discharged because of her age. The complaint also included a pendent claim under the Pennsylvania Human Relations Act, 43 P.S. § 962, and a common law claim for the intentional infliction of emotional distress.

Ms. Clowes was hired by respondent Allegheny Valley Hospital ("Allegheny Hospital") on July 5, 1957. (46A).[1] She held several nursing related positions with the respondent over the course of her employment. (141A-152A). In each of these positions, prior to early 1987, Ms. Clowes received satisfactory performance evaluations and normal salary increases. (191A; 502-503A; 791A; 829A). She was well regarded by her co-workers. (542A; 405A).

On March 31, 1987, petitioner became a member of the Allegheny Hospital's IV team. (47A). The IV team is a unit of registered nurses who are responsible for the administration and monitoring of patient intake of intravenous solutions. (483A). Ms. Clowes was 53 years old at the time. (48A).

Ms. Clowes' supervisor was thirty-four year old Diana Bennett Malloy. (47-48A). Ms. Clowes was the oldest member of Malloy's IV team. (48A). In addition, she was one of only two nurses on the team over fifty years of age. (48A).

Shortly after Ms. Clowes joined the IV team, Malloy commenced an intense campaign of close and harsh supervision of Ms. Clowes. Malloy's attitude towards petitioner was excessively critical, hostile and oppressive. (189A). That treatment was in sharp contrast from that accorded other team members. (188A; 391A; 395A). Malloy followed petitioner on her rounds and obtrusively noted the number of times it took her to start an IV. (198A). Malloy kept a detailed account of petitioner's performance by recording "every little thing" about her performance in an obvious attempt to build a record to discipline and/or discharge Ms. Clowes. (187A; 240A). In addition, Malloy routinely remained at the hospital at the conclusion of the day shift in order to examine petitioner's patient files and discover any alleged "mistakes." (187A). No other member of the IV team was subjected to this sort of excessive, unfair "supervision." (189A; 870-871A).

Moreover, Malloy sharply criticized and demeaned Ms. Clowes in the presence of her co-workers. (394-398A). Most often, Malloy

[1] "___A" citations are to the appendix in the Third Circuit. "___a" citations are to the appendix attached to this Petition.

harshly criticized her in front of other members of the IV team for making numerous multiple needle injections in a patient even though multiple needle injections were not uncommon depending on the age and condition of the patient. (196-197A; 376-377A; 923A; 393A). No other member of the IV team was subjected to such scrutiny or criticism, no matter how many times they had to "stick" patients.

As would be expected, Malloy's excessive supervision and harsh public criticism caused Ms. Clowes to become severely depressed. Indeed, Ms. Clowes consulted a psychiatrist, Dr. Louis Haber, for the growing depression resulting from Malloy's treatment of her. (293A). Dr. Haber diagnosed Ms. Clowes' condition as a "major depressive disorder, single episode". (585-586A). Dr. Haber based his diagnosis, in part, upon Ms. Clowes' description of her problems with Malloy and her perception that she was being unfairly harassed. (581-582A; 597-598A).

In July 1987, Malloy completed an evaluation of petitioner's performance. (1059A). Allegheny Hospital's evaluation form required a supervisor to grade performance on a scale of one to four—one being the poorest and four being the highest. Malloy rated Malloy's performance as a substandard "two" in seven out of thirty-five performance categories. (1059-1063A). In her more than 20 years of being reviewed, petitioner had never before received a rating lower than three. (191A; 829A).

In accordance with hospital procedure, Ms. Clowes was required to meet with Malloy to discuss her performance in those categories because she had received a rating of "two". (1059A). On September 7, 1987, petitioner and Malloy met for that purpose. (344A; 844A) Malloy noted that there had been some improvement in Ms. Clowes' performance. (844-847A; 1064-1065A). Nevertheless, Malloy informed Clowes that continued close supervision would be required. (847A).

Subsequently, Malloy asked petitioner to meet with her on November 5, 1987 to discuss petitioner's performance. Between the September 5, 1987 and November 5, 1987 conferences, Malloy's excessive supervision of Ms. Clowes' performance continued and Malloy compiled a lengthy list of petitioner's alleged shortcomings. (1067A).

At the November 5, 1987 conference, Malloy and Patricia Coffman, a Nursing Department Supervisor, met with Ms. Clowes. (1066A). Malloy provided petitioner with a list of matters that she supposedly needed to correct. (1067-1071A). Ms. Clowes was directed to submit by November 11, 1987 a list of her improvement "goals" to Malloy. (1066A). She was also advised that a weekly conference with Malloy would be required. (1066A). This weekly conference was designed to discuss any continuing performance problems. (1066A). Another evaluation was scheduled for December 18, 1993. (1066A). Petitioner was advised that, if there was no improvement in her job performance, "further disciplinary action" would be taken against her. (1066A; 1071A). It was apparent after the November 5, 1987 conference—if not long before—that nothing Ms. Clowes did would satisfy Malloy and Malloy was bound and determined to build a record to discipline and eventually discharge Ms. Clowes. Following the November 5, 1987, conference, Ms. Clowes was so upset that she took a sick day for the remainder of the day. (1066A).

In response to Malloy's critical review at the November conference, petitioner submitted a written response to both Malloy and hospital administrators, because petitioner felt that she was being unfairly treated. (217-221A). Following the November 5, 1987 conference, petitioner carried out her duties as an IV nurse for only a few days. Petitioner submitted her performance "goals" to Malloy on November 11, 1987. (804A; 1072A). After November 12, 1987, petitioner did not return to work at Allegheny Hospital. (293-294A). She was convinced that Malloy intended to discharge her and she could do nothing to stop that result.

Petitioner used her accumulated vacation and sick leave from November 20, 1987 through December 22, 1987. (294A). She was later transferred to temporary, part-time status, effective December 22, 1987. (294A). Petitioner commenced working at Concordia Nursing Home. (295A). There, Ms. Clowes satisfactorily carried out her job responsibilities which included in part the starting of patient IVs. (294-295A).

Shortly thereafter, Ms. Clowes relocated to Texas and began employment with another hospital. (310A). She was hired as the sole night supervisor of the hospital and held that position up until and during the time of trial. (311-315A).

Petitioner's claims were tried before a jury. At the close of plaintiff's case, the district court entered a directed verdict in favor of respondent on petitioner's claim for the intentional infliction of emotional distress. (456A). At the close of all the evidence, the district court declined to entertain the pendent claim under the Pennsylvania Human Relations Act. (950A).

On October 30, 1991, the jury returned a verdict in favor of petitioner. (17-19a). The jury found that (1) Ms. Clowes was constructively discharged from the employment of the respondent and (2) "plaintiff's age was a determinative factor in [her] constructive discharge". (17-18a).

On November 8, 1991, respondent filed a motion seeking judgment notwithstanding the verdict or, alternatively, for a new trial. The district court denied both motions on the same day. (16a).

Respondent timely filed an appeal to the Third Circuit. Respondent argued principally that there was insufficient evidence to support a claim for constructive discharge as a matter of law and that the district court's order denying its motion for judgment notwithstanding the verdict should be reversed.

On April 23, 1993, the Third Circuit issued an opinion, reversing the jury verdict and granting judgment for respondent. (1a). The Third Circuit held that whether a particular set of facts constituted a constructive discharge "is a question of law and therefore this question is subject to plenary review." (4a). Based on a *de novo* review of the evidence, the Circuit Court found that petitioner had fallen "well short" of satisfying her burden of showing that "the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign." (3-4a). The Third Circuit never reached the issue of whether petitioner's discharge was due to age discrimination.

On May 5, 1993, petitioner filed a timely petition seeking a rehearing of the appeal pursuant to Fed. R. App. P. 40. The petition noted that the Circuit Court had erroneously applied a "plenary" standard of review to a factual finding made by the jury. Petitioner argued that both of these inquiries were "heavily fact driven determinations."

In apparent recognition of its error, and prior to a ruling on the petition for rehearing, the Third Circuit entered an order amending its opinion. (7a). The Circuit Court attempted to correct its error by substituting a single paragraph. The amending order provided that:

> Because this is an appeal from a judgment entered after trial, we must view the historical facts in the light most favorable to the judgment. *See, e.g., Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 921 (3d Cir. 1986). Whether a reasonable employee would resign when confronted with a particular set of circumstances is not, however, a pure question of historical fact, and the appropriate standard of review for such questions of reasonableness is subject to dispute. *See United States v. McKines*, 933 F.2d 1412, 1424-26 (8th Cir. 1991) (*en banc*); *id.* at 1419-22 (Beam, J., dissenting). We need not resolve this question in the present case. Even if subject to review only for clear error, the district court's holding that Clowes was constructively discharged cannot be sustained.

(7-8a). The balance of the opinion—and its holding—remained unchanged.

The petition for rehearing was thereafter denied by order of the Third Circuit on June 16, 1993. (20a).

REASONS FOR GRANTING THE WRIT

Constructive discharge is a critical issue in employment discrimination law. Rather than simply firing an older worker, or a black or female employee, many employers instead decide to make that employee's working conditions so oppressive and intolerable that the employee simply quits. Such an employer can then argue—as Allegheny Hospital has done successfully to date in this case—that the court should never reach the issue of discrimination because the employee was never discharged; he or she voluntarily "resigned".

The constructive discharge issue has arisen repeatedly in employment discrimination cases.[2] It is a dispositive issue in many such cases. And there is a continuing split among the Circuits as to the

[2] *E.g., Stephens v. The C.I.T. Group/Equip. Fin., Inc.*, 955 F.2d 1023 (5th Cir. 1992); *Acrey v. American Sheep Indus. Ass'n*, 981 F.2d 1569 (10th Cir. 1992); *Stamey v. Southern Bell Tel. & Tel. Co.*, 859 F.2d 855 (11th Cir. 1988), *cert. denied*, 490 U.S. 1116 (1989); *Cazzola v. Codman & Shurtleff, Inc.*, 751 F.2d 53 (1st Cir. 1984); *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885 (3d Cir. 1984); *Pena v. Brattleboro Retreat*, 702 F.2d 322 (2d Cir. 1983).

proper standard of review to be applied to jury verdicts or trial court findings of constructive discharge that this Court, we submit, should resolve.

In its initial opinion, the Third Circuit openly held that it was applying a *de novo* standard of review to petitioner's constructive discharge claim. In its Order Amending Slip Opinion, filed *after* petitioner filed her petition for rehearing, the Third Circuit ostensibly postponed for another day the standard of review issue for constructive discharge cases. In fact, however, the Third Circuit never changed its analyses of petitioner's claim and it indeed applied a *de novo* review to the jury's verdict in petitioner's favor. Thus, the Third Circuit has now apparently joined the Sixth Circuit as the only Circuits holding that constructive discharge is a question of law, or at least a mixed question of law and fact, subject to *de novo* review in the appellate courts. Every other Circuit to consider the issue has held routinely that constructive discharge is like any other factual finding, subject to the clearly erroneous standard of review (if a court finding) or the judgment as a matter of law standard of review (if a jury verdict).

This Court, we submit, should resolve this standard of review issue now, before other Circuits compound the error of the Sixth and Third Circuits and before other employment discrimination plaintiffs see their hard-won trial court victories unfairly reversed simply because an appellate court, reviewing a cold record, disagrees with a jury or trial court's verdict.

There was a clear credibility choice concerning the reasons for Malloy's actions. If Malloy's testimony is not believed and Ms. Clowes' testimony is believed, the jury was free to find that Malloy's actions were intended to harass Ms. Clowes out of the workplace because of her age and that Ms. Clowes was, therefore, constructively discharged. It did so here. The Third Circuit's description of the facts can be explained *only* if it made exactly the opposite credibility findings to those of the jury.

The Sixth and Third Circuits' *de novo* review standard is flatly inconsistent with this Court's decision in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), and reflects a fundamental disregard for the constitutionally-mandated deference to jury verdicts under the Seventh Amendment. This Court should reject the *de novo* standard of review for constructive discharge claims and restore the proper appellate deference to jury verdicts and trial court findings.

I. THE *DE NOVO* STANDARD OF REVIEW APPLIED BY THE COURT BELOW IS CONTRARY TO THE HOLDINGS OF EVERY CIRCUIT BUT THE SIXTH AND TO THE PRECEDENTS OF THIS COURT.

In its initial decision, the Third Circuit held that it was applying a *de novo* standard of review to Ms. Clowes' constructive discharge claim:

> The ADEA prohibits, among other things, the "discharge" of a covered individual "because of such individual's age." In this case, Clowes' ADEA claim and the judgment she won were predicated on the assertion that she had been constructively discharged. "We employ an objective test in determining whether an employee was constructively discharged from employment: whether the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign."
>
> *Whether a particular set of facts meets this standard is a question of law and therefore this question is subject to plenary review.*

3-4a (citations omitted; emphasis added).

In its Order Amending Slip Opinion, filed *after* Ms. Clowes filed her petition for rehearing raising the standard of review issue, the Third Circuit ostensibly corrected its standard of review error—or at least postponed it for another day. Thus, the Third Circuit substituted the following paragraph for the standard of review discussion in its initial opinion:

> Because this is an appeal from a judgment entered after trial, we must view the historical facts in the light most favorable to the judgment. Whether a reasonable employee would resign when confronted with a particular set of circumstances is not, however, a pure question of historical fact and the appropriate standard of review for such questions of reasonableness is subject to dispute. *We need not resolve this question in the present case. Even if subject to review only for clear error, the district court's holding that Clowes was constructively discharged cannot be sustained.*

7-8a (citations omitted; emphasis added).

In fact, however, whatever lip service the Order Amending Slip Opinion may have paid to the definition of the standard of review issue, the Court below in fact applied a *de novo* standard of review to the jury's verdict in Ms. Clowes' favor. The Third Circuit essentially accepted as true Allegheny Hospital's explanation that Malloy's excessive supervision was designed merely to maintain the professional standards of her IV team. 2-3a. The vital function of the jury in judging credibility and weighing conflicting evidence was disregarded by the Circuit Court.

According to the Third Circuit, excessive supervision claims have to be "critically examined so that the ADEA is not improperly used as a means of thwarting an employer's nondiscriminatory efforts to insist on high standards." 5a. But, of course, a properly instructed jury, which heard all the witnesses and weighed their credibility, did exactly that: the jury "critically examined" petitioner's claims and found that she was constructively discharged due to her age. The court below simply substituted its judgment of the facts for the jury's judgment because it disagreed with the jury's result.

Thus, whatever the Third Circuit said about its standard of review, in fact the opinion below aligns the Third Circuit with the Sixth Circuit as the only circuits to apply a *de novo* standard of review to constructive discharge claims. *See Yates v. Avco. Corp.*, 819 F.2d 630, 636 (6th Cir. 1987) ("constructive discharge is, at least partially, a question of law and must therefore be reviewed by this Court *de novo*"); *Wheeler v. Southland Corp.*, 875 F.2d 1246, 1249 (6th Cir. 1989) (same).

Every other Circuit to consider the issue has rejected the Third and Sixth Circuits' position and reviews constructive discharge claims as questions of fact, subject to the clearly erroneous standard (if a court finding) or the judgment as a matter of law standard (if a jury verdict). *E.g.*, *Cortes v. Maxus Exploration Corp.*, 977 F.2d 195, 200 (5th Cir. 1992) (determination that plaintiff was constructively discharged reviewed as a finding of fact under the clearly erroneous rule); *E.E.O.C. v. Delight Wholesale Co.*, 973 F.2d 664, 669 (8th Cir. 1992) (district court did not clearly err in finding that defendant deliberately created an intolerable workplace with the intent to cause plaintiff's resignation); *Hirschfeld v. New Mexico Corrections Dep't.*, 916 F.2d 572, 580 (10th Cir. 1990) (constructive discharge is a fact question

subject to the clearly erroneous standard of review); *Watson v. Nationwide Insurance Co.*, 823 F.2d 360, 362 (9th Cir. 1987) (determination of whether conditions were so intolerable and discriminatory as to justify a reasonable employee's decision to resign is normally a factual question left to the trier of fact); *Wardwell v. School Bd.*, 786 F.2d 1554, 1557 (11th Cir. 1986) (the constructive discharge issue, being a question of fact is subject to the clearly erroneous standard of review); *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1252 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986) (in reviewing the reversal of a denial of a motion for judgment n.o.v., court recognized deference due a jury finding of constructive discharge); *Cozzola v. Codman & Shurtleff, Inc.*, 751 F.2d 53, 56 (1st Cir. 1984) (abuse of discretion standard applies to a denial of a motion for a new trial from a jury verdict finding constructive discharge); *Pena v. Brattleboro Retreat*, 702 F.2d 322, 325 (2d Cir. 1983) (review of denial of a motion for judgment n.o.v. requires court to determine whether evidence "reasonably permits only a conclusion in the movants' favor").

Simply put, the Sixth and Third Circuits are wrong and this Court should grant this petition to correct their error and establish once and for all that jury verdicts in employment discrimination cases are entitled to the same deference as any other jury verdict under Federal Rule of Civil Procedure 50(a).

Indeed, the Sixth and Third Circuits' error is exactly the same mistake this Court corrected in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). There, the Fifth Circuit had established a rule that questions of discriminatory intent were "ultimate questions" and hence subject to *de novo* review at the appellate level. *Swint v. Pullman-Standard*, 624 F.2d 525, 533 n.6 (5th Cir. 1980). This Court flatly rejected that approach, holding that discriminatory intent is no different than any other finding-of fact for purposes of the proper appellate standard of review:

> [Discriminatory intent], as we see it, is a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard. It is not a question of law and not a mixed question of law and fact.

Pullman-Standard, supra, 456 U.S. at 288. *See also St. Mary's Honor Center v. Hicks*, ____ U.S. ____, 113 S.Ct. 2742 (1993) (reaffirming that discriminatory intent is a fact issue to be resolved by the finder of fact).

A jury verdict or trial court finding that an employee plaintiff was constructively discharged is no less a finding of fact than is a finding of discriminatory intent. Both require the application of law to facts; both require the resolution of different versions of the truth; both require the weighing of the credibility of witnesses. If discriminatory intent is a pure fact issue, then it necessarily follows that constructive discharge is a fact issue also.

Constructive discharge is not a mixed question of law and fact, subject to *de novo* review in the appellate courts. In *Pullman-Standard, supra*, this Court defined a mixed question of law and fact as one in which

> [t]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.

456 U.S. at 288 n.19.

Whatever else might be said about constructive discharge claims, it is certainly the case that the historical facts are rarely, if ever, undisputed and their significance, in context, is never a matter of stipulation.

By the same token, constructive discharge cases do not require independent review by the appellate courts in order "to preserve the precious liberties established and ordained by the constitution." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984) (First Amendment requires *de novo* appellate review of defamation claims). Constructive discharge cases are not among that small group of actions where fundamental constitutional issues require heightened appellate review. *Id.*

In short, the Sixth and Third Circuits are wrong in applying plenary review to constructive discharge cases and this Court should grant this petition and correct that error.

II. THE GUIDANCE OF THIS COURT IS NECESSARY TO CURB THE DISTURBING WILLINGNESS OF CIRCUIT COURTS—EXEMPLIFIED BY THE DECISION BELOW—TO RE-EXAMINE JURY FINDINGS IN VIOLATION OF THE SEVENTH AMENDMENT.

The Seventh Amendment requires that "no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." As Justice Story long ago explained,

> The trial by jury is justly dear to the American people . . . . One of the strongest objections originally taken against the constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress. . . .

Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830).

This Court has always vigilantly protected the jury's role as fact finder and demanded that due deference be paid to that role by appellate courts. As this Court has repeatedly held, an appellate court is justified in rejecting a jury's finding only where there is a "complete absence of probative facts" to support the jury's conclusion. *International Terminal Operating Co. v. N.V. Nederl Amerik Stoomu Moats*, 393 U.S. 74 (1968); *Dennis v. Denver & Rio Grande Western Railroad Co.*, 375 U.S. 208 (1963); *Basham v. Pennsylvania Railroad Co.*, 372 U.S. 699 (1963); *Herdman v. Pennsylvania Railroad Co.*, 352 U.S. 518 (1957). Indeed, this Court has even stated, in describing the deference due to a jury's verdict, that "a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inferences." *Lavender v. Kurn*, 327 U.S. 645, 653 (1946).

Unfortunately, as evidenced by the result in this case, in recent years the Circuit Courts have shown a disturbing lack of deference to jury verdicts and a willingness to reverse jury findings, particularly in employment discrimination cases. A recent study of published federal appellate opinions for the period October 1984 through October 1985 found that an astonishing 49% of all jury verdicts challenged due to the insufficiency of the evidence were reversed. And the reversal rate for discrimination cases where the jury found in favor of the plaintiff

was an even higher 58.8%. Eric Schnapper, *Judges Against Juries - Appellate Review of Federal Civil Jury Verdicts*, 1989 Wisc. L. Rev. 237, 246-50 (1989).

As Mr. Schnapper concludes, those statistics demonstrate that "left to their own devices, a large number of appellate judges simply cannot resist acting like superjurors, reviewing and revising civil verdicts to assure the result is precisely the verdict they would have returned had they been in the jury box." *Id.* at 354.

This case is a paradigm example of that fallacy. A six-member jury, after hearing all the evidence and weighing the credibility of all the witnesses, held that Allegheny Hospital through Malloy's excessive supervision, demeaning criticism and other harassment of petitioner, constructively discharged her. The Third Circuit did not hold that the type of facts as proven by Ms. Clowes could never, as a matter of law, constitute a constructive discharge. Rather, the Third Circuit held only that Ms. Clowes' claim had to be "critically examined"—and then substituted its own judgment regarding the credibility of those facts for that of the jury.

The Seventh Amendment does not allow for that kind of appellate second-guessing of jury verdicts. This Court should grant this petition and re-affirm the deference to which jury verdicts are most certainly entitled.

CONCLUSION

For the reasons set forth above, petitioner Janet Clowes respectfully submits that the Court grant her Petition for Writ of Certiorari.

Respectfully submitted,

RIKER, DANZIG, SCHERER, HYLAND
& PERRETTI
Attorneys for Petitioner
Janet G. Clowes

By: /s/ ALAN E. KRAUS
ALAN E. KRAUS

Dated: September 14, 1993

APPENDIX

APPENDIX A

Filed April 23, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JANET G. CLOWES,

Appellee

v.

ALLEGHENY VALLEY HOSPITAL,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 89-01855)

Argued: December 3, 1992
Before: SCIRICA, ALITO, and LEWIS, *Circuit Judges*
(Opinion Filed: April 23, 1993)

HELEN R. KOTLER, ESQ., (Argued)
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Attorney for Appellant

OPINION OF THE COURT

ALITO, *Circuit Judge:*

Allegheny Valley Hospital appeals from a judgment awarded under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*,

based on the constructive discharge of a former employee. We hold that the evidence at trial was insufficient to prove a constructive discharge, and we therefore reverse the judgment of the district court.

I.

Janet Clowes was employed as a nurse in full- or part-time positions by Allegheny Valley Hospital for nearly 30 years. In March 1987, Clowes, then 53 years old, requested and was granted a transfer to the IV (intravenous) Team. Members of the IV Team were required to insert and change IV's, to make sure that IV's were flowing properly, and to document the procedures performed.

After Clowes's transfer, her supervisor was Diana Bennett Malloy, the IV Team's 34-year-old head nurse. Friction between Malloy and Clowes soon developed.

Clowes claimed that Malloy singled her out for especially close and harsh supervision. In particular, Clowes asserted that Malloy unfairly criticized her for ineptitude in starting IVs. According to Malloy, Clowes too often had to make more than a single needle injection or "stick" in order to start an IV, but Clowes claimed that she was "not doing any more sticks than anyone else" on the staff. Clowes also alleged that Malloy followed her around the hospital and recorded the number of "sticks" she made with each patient but that Malloy made no effort to keep track of the number of "sticks" made by other nurses. Indeed, Clowes asserted that Malloy remained in the hospital after Clowes's day shift ended in order to "check every one of [Clowes's] patients [to] see if she could find anything that [Clowes] did wrong." Clowes said that Malloy would write down everything that Clowes did or said. In addition, Clowes claimed that Malloy spoke to her in a "demeaning, condescending manner" different from that employed with the rest of the staff and that Malloy criticized her sharply in the presence of other nurses. Clowes also pointed to the fact that Malloy's written evaluations often assessed her as "fair" although she had never before received an evaluation of less than "good." Clowes claimed that as a result of this treatment she began to suffer from depression and related symptoms and required psychiatric and other medical treatment.

The hospital painted a different picture of the reasons for the conflict between Malloy and Clowes. The hospital claimed that Clowes's performance on the job declined and that Malloy was concerned about

maintaining the professional standards of the IV Team. The hospital asserted that Clowes repeatedly failed to complete the required documentation on her patients, that she was disorganized and had difficulty setting priorities, and that other nurses complained that she made too many "stick" attempts and did not attend to irritated catheter sites.

On November 5, 1987, Malloy and a Nursing Department supervisor held a conference with Clowes and discussed her alleged deficiencies. Clowes was instructed to submit a list of written goals, and she was also informed that her performance would be reviewed periodically and that any problems would be discussed. In addition, Malloy told her that disciplinary action would be taken if she did not improve. Shortly thereafter, Clowes submitted written goals, as well as a response to Malloy's criticisms. Clowes's last day of work at the hospital was November 12. Beginning on November 13, Clowes took vacation and sick leave, and was later placed at her own request on temporary part-time status due to medical reasons. At the end of November, Clowes began working at a nursing home. In March 1988, she submitted a grievance to the hospital, but it was rejected as untimely.

In August 1989, Clowes commenced this action in the United States District Court for the Western District of Pennsylvania. Count 1 of her complaint alleged that the Allegheny Valley Hospital had violated the ADEA by "forcing her to an involuntary retirement" based on her age. The other two counts asserted pendent state claims that are not involved in this appeal.

Clowes's case went to trial before a jury, and the jury returned a verdict in her favor. In response to special interrogatories, the jury found that Clowes had been constructively discharged and that age had been a determinative factor. The district court subsequently entered judgment for Clowes and denied the hospital's motion for judgment notwithstanding the verdict or for a new trial. This appeal followed.

II.

The ADEA prohibits, among other things, the "discharge" of a covered individual "because of such individual's age." 29 U.S.C. § 623(1). In this case, Clowes's ADEA claim and the judgment she won were predicated on the assertion that she had been constructively discharged. "We employ an objective test in determining whether an employee was constructively discharged from employment: whether

'the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign.' " *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1079 (3d Cir. 1992) (quoting *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 887-88 (3d Cir. 1984)).

Whether a particular set of facts meets this standard is a question of law, and therefore this question is subject to plenary review. *Levendos v. Stern Entertainment, Inc.*, 909 F.2d 747, 749 (3d Cir. 1990). However, because this is an appeal from a judgment entered after trial, we must view the historical facts in the light most favorable to the judgment. *See, e.g., Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 921 (3d Cir. 1986). Applying these standards, we hold that the evidence in this case fell well short of establishing a constructive discharge.

We first note that Clowes cannot rely on many of the factors commonly cited by employees who claim to have been constructively discharged. Clowes was never threatened with discharge; nor did her employer ever urge or suggest that she resign or retire. *Compare Spulak v. K-Mart Corp.*, 894 F.2d 1150, 1154 (10th Cir. 1990); *Levendos v. Stern Entertainment, Inc.*, 860 F.2d 1227, 1228 (3d Cir. 1988) (reversing summary judgment for employer). Similarly, Clowes's employer did not demote her[1] or reduce her pay or benefits.[2] Clowes was not involuntarily transferred to a less desirable position,[3] and her job responsibilities were not altered in any way.[4] She was not even

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[1] *See. e.q., Shealy v. Winston*, 929 F.2d 1009 (4th Cir. 1991); *Huckley v. Hospital Corp. of America*, 758 F.2d 1525, 1530-31 (11th Cir. 1985). These cases and those cited in footnotes three and five are cited solely to illustrate some of the factors on which plaintiffs claiming constructive discharge have relied. We express no view as to whether these decisions gave those factors the proper weight.

[2] *See, e.g., Berger v. Edgewater Steel Co.*, 911 F.2d 911, 923 (3d Cir. 1990), *cert. denied.* 111 S. Ct. 1310 (1991).

[3] *See, e.g., Meyer v. Brown & Root Construction Co.*, 661 F.2d 369 (5th Cir. 1981); *Muller V. U.S. Steel Corp.*, 509 F.2d 923 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975).

[4] *See, e.g., Gray*, 957 F.2d at 1082 (reporter removed from desirable beat; no constructive discharge); *Goss*, 747 F.2d at 888-89 (sales representative removed from prior territory; constructive discharge).

given unsatisfactory job evaluations[5] but merely received ratings of "fair."

It is also highly significant that Clowes, prior to leaving her position with the hospital, never requested to be transferred to another position, never advised the hospital that she would feel compelled to leave if changes regarding the manner in which she was being supervised were not made, and did not even attempt to file a grievance until long after she had stopped working at the hospital. As other courts of appeals have noted, a reasonable employee will usually explore such alternative avenues thoroughly before coming to the conclusion that resignation is the only option.[6] *Bozé v. Branstetter,* 912 F.2d 801, 805 (5th Cir. 1990); *Garner v. Wal-Mart Stores, Inc.,* 807 F.2d 1536, 1539 (11th Cir. 1987).[7]

Moreover, it is significant, in our view, that Clowes's complaints focused exclusively on Malloy's allegedly overzealous supervision of her work. Clowes has not brought to our attention a single case in which a constructive discharge has been found based solely upon such supervision. While we do not hold that an employer's imposition of unreasonably exacting standards of job performance may never amount to a constructive discharge, we are convinced that a constructive discharge claim based solely on evidence of close supervision of job performance must be critically examined so—that the ADEA is not improperly used as a means of thwarting an employer's nondiscriminatory efforts to insist on high standards.

In support of her claim of constructive discharge, Clowes relies heavily on evidence regarding the impact that the events in question

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[5] *See, e.g., Junior v. Texaco, Inc.,* 688 F.2d 377, 380 (5th Cir. 1982).

[6] We do not require that such steps be taken in all cases. An employee may be able to show working conditions were so intolerable that a reasonable employee would feel forced to resign without remaining on the job for the period necessary to take those steps. In this case, however, the evidence is lacking in other respects and the plaintiff's complaint focuses exclusively on the actions of one supervisor; accordingly, we find it significant that the plaintiff did not even request a transfer before deciding to resign.

[7] In a somewhat similar vein, some courts have held that an employee must generally pursue litigation before quitting and claiming constructive discharge. *See, e.g., Brooms v. Regal Tube Co.,* 881 F.2d 412, 423 (7th Cir. 1989); *Bourque v. Powell Elec. Mfg. Co.,* 617 F.2d 61, 65-66 (5th Cir. 1980).

had on her. But as we have noted, " 'the law does not permit an employee's subjective perceptions to govern a claim of constructive discharge.' " *Gray*, 957 F.2d at 1083 (quoting *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985)).

We recognize that the jury, which heard testimony by both Clowes and Malloy, presumably concluded that Malloy treated Clowes unfairly and that her criticisms of Clowes were not entirely warranted. We accept these apparent conclusions for purposes of this appeal, but it is clear that unfair and unwarranted treatment is by no means the same as constructive discharge.

In sum, we hold that the evidence in this case was insufficient to show that Clowes was constructively discharged. The judgment of the district court is therefore reversed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix A

For Publication May 27, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3271

JANET G. CLOWES,

Appellee

v.

ALLEGHENY VALLEY HOSPITAL,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 89-01855)

Argued: December 3, 1992
Before: SCIRICA, ALITO, and LEWIS, *Circuit Judges*
Dated: May 27, 1993

ORDER AMENDING SLIP OPINION

IT IS HEREBY ORDERED that the slip opinion in the above case, filed April 23, 1993, be amended as follows: Delete the paragraph that begins at the bottom of page 4 and continues on page 5. In its place, insert the following:

Because this is an appeal from a judgment entered after trial, we must view the historical facts in the light most favorable to the judgment. *See, e.g., Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 921 (3d Cir. 1986). Whether a reasonable employee would resign when confronted with a particular set of circumstances is not, however, a pure question of historical fact, and the appropriate standard of review for such questions of reasonableness is subject to dispute. *See United States v. McKines*, 933 F.2d 1412, 1424-26 (8th Cir.

1991) *(en banc); id.* at 1419-22 (Beam, J., dissenting). We need not resolve this question in the present case. Even if subject to review only for clear error, the district court's holding that Clowes was constructively discharged cannot be sustained.

BY THE COURT,

/s/ SAMUEL A. ALITO, JR.

Samuel A. Alito, Jr.,
Circuit Judge

Dated: May 27, 1993

Appendix A

JANET G. CLOWES, APPELLEE

v.

ALLEGHENY VALLEY HOSPITAL, APPELLANT

NO. 92-3271

UNITED STATES COURT OF APPEALS,
THIRD CIRCUIT.

ARGUED DEC. 3, 1992.
DECIDED APRIL 23, 1993
AS AMENDED MAY 27, 1993

Reported at 991 F.2d 1159 (3d Cir. 1993)

Helen R. Kotler (argued), Jere Krakoff, Pittsburgh, PA, for appellee.

John E. Lyncheski (argued), Robert S. Grigsby, Jeffrey P. Bauman, Cohen & Grigsby, P.C., Pittsburgh, PA, for appellant.

Before: SCIRICA, ALITO, and LEWIS, Circuit Judges.

OPINION OF THE COURT

ALITO, *Circuit Judge:*

Allegheny Valley Hospital appeals from a judgment awarded under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, based on the constructive discharge of a former employee. We hold that the evidence at trial was insufficient to prove a constructive discharge, and we therefore reverse the judgment of the district court.

I.

Janet Clowes was employed as a nurse in full- or part-time positions by Allegheny Valley Hospital for nearly 30 years. In March 1987,

Clowes, then 53 years old, requested and was granted a transfer to the IV (intravenous) Team. Members of the IV Team were required to insert and change IV's, to make sure that IV's were flowing properly, and to document the procedures performed.

After Clowes's transfer, her supervisor was Diana Bennett Malloy, the IV Team's 34-year-old head nurse. Friction between Malloy and Clowes soon developed.

Clowes claimed that Malloy singled her out for especially close and harsh supervision. In particular, Clowes asserted that Malloy unfairly criticized her for ineptitude in starting IVs. According to Malloy, Clowes too often had to make more than a single needle injection or "stick" in order to start an IV, but Clowes claimed that she was "not doing any more sticks than anyone else" on the staff. Clowes also alleged that Malloy followed her around the hospital and recorded the number of "sticks" she made with each patient but that Malloy made no effort to keep track of the number of "sticks" made by other nurses. Indeed, Clowes asserted that Malloy remained in the hospital after Clowes's day shift ended in order to "check every one of [Clowes's] patients [to] see if she could find anything that [Clowes] did wrong." Clowes said that Malloy would write down everything that Clowes did or said. In addition, Clowes claimed that Malloy spoke to her in a "demeaning, condescending manner" different from that employed with the rest of the staff and that Malloy criticized her sharply in the presence of other nurses. Clowes also pointed to the fact that Malloy's written evaluations often assessed her as "fair" although she had never before received an evaluation of less than "good." Clowes claimed that as a result of this treatment she began to suffer from depression and related symptoms and required psychiatric and other medical treatment.

The hospital painted a different picture of the reasons for the conflict between Malloy and Clowes. The hospital claimed that Clowes's performance on the job declined and that Malloy was concerned about maintaining the professional standards of the IV Team. The hospital asserted that Clowes repeatedly failed to complete the required documentation on her patients, that she was disorganized and had difficulty setting priorities, and that other nurses complained that she made too many "stick" attempts and did not attend to irritated catheter sites.

On November 5, 1987, Malloy and a Nursing Department supervisor held a conference with Clowes and discussed her alleged deficiencies. Clowes was instructed to submit a list of written goals, and she was also informed that her performance would be reviewed periodically and that any problems would be discussed. In addition, Malloy told her that disciplinary action would be taken if she did not improve. Shortly thereafter, Clowes submitted written goals, as well as a response to Malloy's criticisms. Clowes's last day of work at the hospital was November 12. Beginning on November 13, Clowes took vacation and sick leave, and was later placed at her own request on temporary part-time status due to medical reasons. At the end of November, Clowes began working at a nursing home. In March 1988, she submitted a grievance to the hospital, but it was rejected as untimely.

In August 1989, Clowes commenced this action in the United States District Court for the Western District of Pennsylvania. Count 1 of her complaint alleged that the Allegheny Valley Hospital had violated the ADEA by "forcing her to an involuntary retirement" based on her age. The other two counts asserted pendent state claims that are not involved in this appeal.

Clowes's case went to trial before a jury, and the jury returned a verdict in her favor. In response to special interrogatories, the jury found that Clowes had been constructively discharged and that age had been a determinative factor. The district court subsequently entered judgment for Clowes and denied the hospital's motion for judgment notwithstanding the verdict or for a new trial. This appeal followed.

II.

The ADEA prohibits, among other things, the "discharge" of a covered individual "because of such individual's age." 29 U.S.C. § 623(1). In this case, Clowes's ADEA claim and the judgment she won were predicated on the assertion that she had been constructively discharged. "We employ an objective test in determining whether an employee was constructively discharged from employment: whether 'the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign.' " *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1079 (3d Cir. 1992) (quoting *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 887-88 (3d Cir. 1984)).

Because this is an appeal from a judgment entered after trial, we must view the historical facts in the light most favorable to the judgment. *See, e.g., Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 921 (3d Cir. 1986). Whether a reasonable employee would resign when confronted with a particular set of circumstances is not, however, a pure question of historical fact, and the appropriate standard of review for such questions of reasonableness is subject to dispute. *See United States v. McKines*, 933 F.2d 1412, 1424-26 (8th Cir. 1991) *(en banc); id.* at 1419-22 (Beam, J., dissenting). We need not resolve this question in the present case. Even if subject to review only for clear error, the district court's holding that Clowes was constructively discharged cannot be sustained.

We first note that Clowes cannot rely on many of the factors commonly cited by employees who claim to have been constructively discharged. Clowes was never threatened with discharge; nor did her employer ever urge or suggest that she resign or retire. *Compare Spulak v. K-Mart Corp.*, 894 F.2d 1150, 1154 (10th Cir. 1990); *Levendos v. Stern Entertainment, Inc.*, 860 F.2d 1227, 1228 (3d Cir. 1988) (reversing summary judgment for employer). Similarly, Clowes's employer did not demote her[1] or reduce her pay or benefits.[2] Clowes was not involuntarily transferred to a less desirable position,[3] and her job responsibilities were not altered in any way.[4] She was not even given unsatisfactory job evaluations[5] but merely received ratings of "fair."

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[1] *See, e.g., Shealy v. Winston*, 929 F.2d 1009 (4th Cir. 1991); *Huckley v. Hospital Corp. of America*, 758 F.2d 1525, 1530-31 (11th Cir. 1985). These cases and those cited in footnotes three and five are cited solely to illustrate some of the factors on which plaintiffs claiming constructive discharge have relied. We express no view as to whether these decisions gave those factors the proper weight.

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[3] *See, e.g., Meyer v. Brown & Root Construction Co.*, 661 F.2d 369 (5th Cir. 1981); *Muller V. U.S. Steel Corp.*, 509 F.2d 923 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975).

[4] *See, e.g., Gray*, 957 F.2d at 1082 (reporter removed from desirable beat; no constructive discharge); *Goss*, 747 F.2d at 888-89 (sales representative removed from prior territory; constructive discharge).

[5] *See, e.g., Junior v. Texaco, Inc.*, 688 F.2d 377, 380 (5th Cir. 1982).

It is also highly significant that Clowes, prior to leaving her position with the hospital, never requested to be transferred to another position, never advised the hospital that she would feel compelled to leave if changes regarding the manner in which she was being supervised were not made, and did not even attempt to file a grievance until long after she had stopped working at the hospital. As other courts of appeals have noted, a reasonable employee will usually explore such alternative avenues thoroughly before coming to the conclusion that resignation is the only option.[6] *Bozé v. Branstetter*, 912 F.2d 801, 805 (5th Cir. 1990); *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir. 1987).[7]

Moreover, it is significant, in our view, that Clowes's complaints focused exclusively on Malloy's allegedly overzealous supervision of her work. Clowes has not brought to our attention a single case in which a constructive discharge has been found based solely upon such supervision. While we do not hold that an employer's imposition of unreasonably exacting standards of job performance may never amount to a constructive discharge, we are convinced that a constructive discharge claim based solely on evidence of close supervision of job performance must be critically examined so—that the ADEA is not improperly used as a means of thwarting an employer's nondiscriminatory efforts to insist on high standards.

In support of her claim of constructive discharge, Clowes relies heavily on evidence regarding the impact that the events in question had on her. But as we have noted, " 'the law does not permit an employee's subjective perceptions to govern a claim of constructive

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[6] We do not require that such steps be taken in all cases. An employee may be able to show working conditions were so intolerable that a reasonable employee would feel forced to resign without remaining on the job for the period necessary to take those steps. In this case, however, the evidence is lacking in other respects and the plaintiff's complaint focuses exclusively on the actions of one supervisor; accordingly, we find it significant that the plaintiff did not even request a transfer before deciding to resign.

[7] In a somewhat similar vein, some courts have held that an employee must generally pursue litigation before quitting and claiming constructive discharge. *See, e.g., Brooms v. Regal Tube Co.*, 881 F.2d 412, 423 (7th Cir. 1989); *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65-66 (5th Cir. 1980).

discharge.' " *Gray*, 957 F.2d at 1083 (quoting *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985)).

We recognize that the jury, which heard testimony by both Clowes and Malloy, presumably concluded that Malloy treated Clowes unfairly and that her criticisms of Clowes were not entirely warranted. We accept these apparent conclusions for purposes of this appeal, but it is clear that unfair and unwarranted treatment is by no means the same as constructive discharge.

In sum, we hold that the evidence in this case was insufficient to show that Clowes was constructively discharged. The judgment of the district court is therefore reversed.

Appendix A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 89-1855

JANET G. CLOWES

v.

ALLEGHENY VALLEY HOSPITAL

JUDGMENT ON A CIVIL CASE

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict. by Special Interrogatories.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is entered in favor of the plaintiff, Janet G. Clowes, and against the defendant, Allegheny Valley Hospital in the amount of $13,295.00.

Approved:

/s/ Alan N. Bloch
United States District Judge
10/31/91

Oct 31, 1991
Date

/s/ Catherine D. Martrano
Clerk

/s/ Colleen Williams
(By) Deputy Clerk

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 89-1855

JANET G. CLOWES

Plaintiff,

vs.

ALLEGHENY VALLEY HOSPITAL,

Defendant.

ORDER

AND NOW, this 8th day of November, 1991, upon consideration of Defendant's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion for New Trial, filed in the above captioned matter on November 8, 1991,

IT IS HEREBY ORDERED that said Motion is DENIED.

/s/ Alan N. Bloch
United States District Judge

cc: HELEN KOTLER, Esquire
475 Union Trust Building,
Pittsburgh, PA 15219

ROBERT GRIGSBY, Esquire
2900 CNG Tower, 625 Liberty Avenue,
Pittsburgh, PA 15222

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 89-1855

JANET G. CLOWES, an individual,

Plaintiff,

vs.

ALLEGHENY VALLEY HOSPITAL,

Defendant

VERDICT

AND NOW, this 30th day of October, 1991, we, the Jurors empaneled in the above captioned case, find as follows:

Section I

1. Do you find by a preponderance of the evidence that plaintiff was constructively discharged from employment with the defendant?

_X_ Yes
____ No

If your answer to question No. 1 is "yes," proceed to question No. 2. If your answer to question No. 1 is "no," enter a verdict in favor of defendant and against plaintiff in Section II and proceed no further; sign and date the verdict form.

2. Do you find by a preponderance of the evidence that plaintiff's age was a determinative factor in the constructive discharge of plaintiff?

__X__ Yes
_____ No

If your answer to question No. 2 is "yes," enter a verdict in favor of plaintiff and against defendant in Section II and proceed to Section III, question No. 3. If your answer to question No. 2 is "no," enter a verdict in favor of defendant and against plaintiff in Section II and proceed no further; sign and date the verdict form.

Section II

_____ – Verdict in favor of defendant Allegheny Valley Hospital and against plaintiff Janet G. Clowes.

__X__ – Verdict in favor of plaintiff Janet G. Clowes and against defendant Allegheny Valley Hospital.

Section III

3. What sum of money do you find by a preponderance of the evidence to be the total amount of plaintiff's damages?

$15,855.00.

Proceed to question No. 4.

4. Do you find by a preponderance of the evidence that plaintiff has failed to mitigate damages?

__X__ Yes
_____ No

If your answer to question No. 4 is "no," proceed no further; sign and date the verdict form. If your answer to question No. 4 is "yes," proceed to question No. 5.

5. What sum of money in addition to that she actually earned do you find plaintiff could have earned had she been reasonably diligent in mitigating damages?

$2,560.00 .

Sign and date the verdict form.

X _____

X _____

X _____

X _____

X _____

X _____

NET DAMAGES EXCLUDING ATTORNEY'S FEES $13,295.00

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3271

JANET G. CLOWES,

Appellee

v.

ALLEGHENY VALLEY HOSPITAL,

Appellant

(D.C. Civil No. 89-01855)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*
BECKER, STAPLETON, MANSMAN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD,
ALITO, ROTH and LEWIS, *Circuit Judges*

The petition for rehearing filed by appellee in the above-entitled case have been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Samuel A. Alito, Jr.,
Circuit Judge

Dated: June 16, 1993

Supreme Court, U.S.
FILED
OCT 14 1993
OFFICE OF THE CLERK

(2)

No. 93-427

In The

Supreme Court of the United States

October Term, 1993

JANET G. CLOWES,

Petitioner,

v.

ALLEGHENY VALLEY HOSPITAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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Petitioner Janet G. Clowes (hereinafter "Clowes") has petitioned the Court seeking a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit. The court of appeals held that there was insufficient evidence as a matter of law that Clowes had been "constructively discharged" by the Respondent, Allegheny Valley Hospital[1] (hereinafter "Allegheny Valley Hospital" or the "Hospital"), because of her age in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634 (1990) (hereinafter "ADEA"). The basis for Clowes' petition is an alleged split between the circuit courts of appeal as to the applicable standard of review for trial court findings of constructive discharge. The Hospital opposes the petition for certiorari because, contrary to Clowes' argument, this case presents no split among the circuits and because the Third Circuit properly reviewed the judgment of the district court.

COUNTER-STATEMENT OF THE CASE

Clowes commenced this action against Allegheny Valley Hospital in the United States District Court for the Western District of Pennsylvania on September 1, 1989. The case was tried to a jury before U.S. District Judge Alan N. Bloch from October 22 through October 30, 1991.

[1] Allegheny Valley Hospital is a wholly-owned subsidiary of Allegheny Valley Health System, Inc. Allegheny Valley Health System, Inc. also owns two other subsidiary corporations: Allegheny Valley Hospital Foundation, Inc. and Valley Development and Management Corp.

At trial, it was not disputed that Allegheny Valley Hospital neither formally terminated Clowes' employment nor asked her to resign. (R. 335A-336A)[2] Rather, Clowes voluntarily resigned from her full-time position with the Hospital and transferred to temporary part-time status on November 20, 1987. (R. 482A) At the time of her transfer, Clowes was age 54. (R. 137A) Since Clowes was never actually discharged, her only hope for establishing an ADEA violation was to prove at trial that she had been "constructively discharged" by showing that because of Clowes' age the Hospital knowingly made her working conditions so unpleasant or difficult that a reasonable employee in her shoes would have resigned. Much of the evidence presented on this issue was undisputed.

Clowes began her employment for Allegheny Valley Hospital as a staff nurse on July 5, 1957. The Hospital is a non-profit, acute care facility located in Natrona Heights, Pennsylvania. The Hospital's facilities include 307 licensed adult beds. (R. 463A) The Hospital provides a broad range of medical services, including an emergency department, intensive care, cardiac care, operating rooms, labor and delivery, as well as areas for general diagnosis and treatment. (R. 464A)

Between 1957 and 1985, Clowes worked in a variety of positions in the Hospital, sometimes on a part-time basis. (R. 141A, 146A, 149-150A) Effective July 26, 1985, Clowes left her full-time employment at the Hospital to

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[2] References to the Appendix reproduced for the Third Circuit are designated as "(R. ___A);" References to the Appendix included with Clowes' Petition for Certiorari are indicated as "(___a)".

accept a position as a Home Health Care nurse for another employer. While at Home Health Care, Clowes remained on temporary part-time status at the Hospital. (R. 150A-152A)

On March 10, 1986, Clowes returned to full-time status as a staff nurse in the Hospital's Progressive Care Unit ("PCU"). When Clowes became a staff nurse in PCU in 1986, her head nurse, Ann McCutcheon, noted problems with her performance. (R. 721A-723A) On two separate occasions, on October 1, 1986 and on December 23, 1986, Clowes failed to count narcotics at the end of her shift, a basic but important nursing responsibility. (R. 721A) Clowes was given a verbal warning after the October 1, 1986 incident. On December 23, 1986, a written warning was issued to Clowes for her repeat serious omission in her duties. (R. 721A-723A, 1025A)

On March 31, 1987, Clowes requested and was granted a transfer to the IV Team as a general staff nurse. The IV Team was a new experience for Clowes. Unlike traditional nursing, where a nurse is responsible for general nursing care of a set number of patients on a single nursing unit, IV Team members are responsible for administering and monitoring intake of medications by intravenous means for patients throughout the Hospital. (R. 483A) Thus, the IV Team nurse must perform highly specialized medical procedures on approximately 50 patients throughout the day. (R. 863A)

At the time of Clowes' transfer, the supervisor of the IV Team was Diana Bennett Malloy. (R. 47A-48A) While Nurse Malloy was less than 40 years of age, seven of the other ten nurses of the IV Team were older than 40 years

of age. (R. 48A, 347A-349A) Other than Clowes, none of these older nurses complained about Malloy's supervision or alleged that she was biased against older workers.

Indeed, there was no evidence presented that Nurse Malloy, or any other Hospital supervisor, *ever* mentioned Clowes' age. Rather, much of the evidence at trial concerned Clowes' performance as a member of the IV Team. Significantly, at no time during trial did Clowes offer any evidence that the performance shortcomings noted below, which served as the basis for Nurse Malloy's evaluations and counselings, were false or unworthy of credence. The evidence of Clowes' performance problems, thus, stood unrebutted.

In Clowes' written orientation evaluation, which covered the period from her starting date with the IV Team until April 16, 1987, she received the lowest possible rating in setting priorities and planning for patient needs. (R. 1015A) Although in many areas Clowes' IV Team performance was deemed acceptable, she exhibited difficulty in setting priorities and in delegating her duties. (R. 1015A) Specifically, when an unanticipated event, such as an emergency, required Clowes' attention, she experienced an inability to deal with the situation and to adapt her schedule to meet the demands of her IV Team assignments. (R. 1015A)

After completing her orientation to the IV Team in April, 1987, and after receiving the above evaluation, Clowes' performance problems continued. Specifically,

Clowes had difficulty accurately completing the documentation required on IV patients. (R. 1059A) She consistently failed to write dates, diagnoses and allergies on IV patient profiles. (R. 1059A)

IV patient profiles require basic, objective information, such as the date and type of medication administered, the date medication is discontinued, and the nurse's initials. (R. 182A) Other nurses and medical personnel rely on this information for their care of a patient on IV therapy. (R. 183A) Clowes consistently failed to perform even these straightforward requirements of documentation. (R. 1059A) Also, Clowes failed to document required information on the patients' catheter site where the IV is inserted. (R. 1059A) IV patients are often among the most critically ill and this catheter site information could be vital in an emergency. Clowes' failure to document properly was clearly noted on her July, 1987 performance evaluation. (R. 840A, 1059A)

While noting Clowes' continuing documentation difficulties, Clowes' July, 1987 performance evaluation was, by and large, satisfactory and Nurse Malloy recommended that Clowes receive an increase in salary. In fact, Clowes was given a satisfactory or better rating in 28 of 35 performance categories and was given the *highest possible rating* in ten of the categories. (R. 841A, 1059A-1063A) Thus, in this *otherwise satisfactory* evaluation by Nurse Malloy, it was noted that Clowes demonstrated a continued inability to correct her problem with documentation of patient information and to set priorities so that patients would be cared for in a prompt and efficient manner. (R. 840A-843A, 1059A)

As noted on the July, 1987 evaluation, if an employee is given a rating of 2 or less in a category, under established Hospital procedure, there is a follow-up meeting required between the employee and her supervisor. (R. 1059A) Because Clowes received ratings of 2 or less in several performance categories, relating primarily to her documentation difficulties, a meeting was arranged between Clowes and Nurse Malloy to review her problems in these areas. Nurse Malloy met with Clowes on September 7, 1987 to discuss Clowes' unsatisfactory performance. (R. 344A, 844A) The meeting focused on the two areas in which Clowes exhibited the most difficulty: priority setting and documentation. While Nurse Malloy noted some improvement in Clowes' performance, it was determined that Clowes would be counseled for future problems in this area in a further effort to help her bring her performance as an IV Team nurse to acceptable standards. (R. 844A-847A, 1064A)

Despite the Hospital's efforts to help Clowes improve, her performance as an IV Team nurse again deteriorated. By October, 1987, a significant number of errors and deficiencies had been noted. Nurse Malloy began to receive unsolicited complaints from Clowes' fellow IV Team RNs about problems with Clowes' job performance. (R. 1066A) Clowes made significantly more documentation errors than the other IV Team nurses. (R. 874A) In light of these complaints and the existence of continued errors, Nurse Malloy met with Clowes on a number of occasions to discuss the deficiencies in Clowes' performance and documentation and to encourage her to improve these aspects of her work. (R. 1067A)

The complaints by the RNs with whom Clowes worked included incidents where Clowes failed to attend to irritated catheter sites and had to make multiple venapuncture or "stick" attempts when attempting to start an IV on her patients. (R. 1067A) Other employees reported that Clowes was still unable to set priorities and to function in an organized manner, which created staffing problems requiring other nurses to cover for Clowes. (R. 1067A) Still other employees complained of Clowes' inability to perform on busy days, to complete IV patient profiles, and to document IV patient catheter information and patient charts correctly. Also, Clowes misplaced records of certain patient saline flushes, thereby preventing the Hospital from being reimbursed for their costs. (R. 1067A)

Other examples of Clowes' performance problems on the IV Team included: on September 23, 1987, Clowes did not enter any dates on an IV patient profile for an IV tubing change. (R. 1067A) On October 8, 1987, Clowes did not document a patient catheter change nor did she correctly prepare a written catheter report. (R. 1067A) On that same day, Clowes did not record the insertion of a catheter on a patient's parenteral therapy sheet. (R. 1067A) On October 25, Clowes failed to enter the time or the patient's room number on a patient profile. (R. 1067A) In addition, for another patient, Clowes failed to report the use of a catheter cap and incorrectly documented a catheter dressing change report. (R. 1067A) As a result, none of this necessary medical information was properly available to subsequent medical care-givers for these many IV patients.

Again on October 28, Clowes incorrectly entered a patient's name on a written report. More importantly, an incorrect report required the reinsertion of a patient's IV push needle. (R. 1067A) In four other incidents on that date, incorrect entries were made by Clowes for the type of treatment she had administered to IV patients. Also, Clowes entered an incorrect date as to the time she had changed a patient's catheter. On yet another patient's chart, Clowes neglected to document the patient's room number. (R. 1067A)

On October 30, Clowes' reports for three separate IV patients were incomplete or incorrect. Finally, on November 3, it was discovered that Clowes again failed to document the date on which a patient's catheter was inserted and did not, contrary to standard, required procedure, initial the patient's dressing so if there was a problem or question she could be contacted. (R. 1067A) All of the foregoing, of course, potentially impacted on the patient care being rendered to these acutely ill patients by other hospital medical personnel who would rely on such information.

Because of these incidents and the numerous unsolicited complaints by her fellow employees, a conference was held with Clowes on November 5, 1987. Nurse Malloy and Patricia Coffman, a Nursing Department Supervisor, discussed with Clowes her work deficiencies and the complaints of her co-workers. (R. 850, 1066A)

It was determined at the conference that Clowes would submit a list of written goals for improvement to Nurse Malloy by November 11, 1987. (R. 1066A) Clowes was told that Nurse Malloy would monitor her IV Team

performance for one month and that they would discuss any problems found during that time. Nurse Malloy and Clowes were to meet on a weekly basis to review her performance. (R. 1066) Additionally, Nurse Malloy and Nursing Supervisor Coffman were to follow up with an evaluation of Clowes' progress on December 18, 1987. (R. 1066A) Finally, although the Hospital was going to great lengths to help Clowes improve her performance to acceptable standards, she was advised that if there was not significant improvement, further action might be taken. Clowes was not threatened with discharge or any other discipline at this time. After the November 5 conference, Clowes was upset and went home for the day. (R. 794A-803A, 1066A)

After the meeting on November 5, 1987, Clowes' performance as an IV Team nurse was more closely monitored to ensure that her IV patient care complied with acceptable standards and that she was attempting to improve. Despite the Hospital's extensive efforts and patience with Clowes, there still remained numerous inadequacies and inconsistencies in her documentation of patient IV information. On November 7, 1987, Clowes failed to record medication given to a patient. (R. 858A-859A, 1018A) The next day, Clowes incorrectly documented a patient's catheter site and had difficulty with her venapuncture technique. (R. 1018A) On November 10, 1987, Clowes failed to document a tubing change correctly and on November 12, 1987, she failed to remove a discharged patient's IV profile in a timely fashion. (R. 1018A)

Rather than providing objective evidence to refute these numerous performance shortcomings noted by

Nurse Malloy and others, Clowes relied at trial upon her subjective reactions to Malloy's efforts to improve her performance. Toward this end, Clowes presented a virtual catalogue of perceived mistreatment by Nurse Malloy: Nurse Malloy criticized her because of her performance shortcomings. (R. 186A, 191A) Nurse Malloy apparently criticized her in front of others. (R. 189A, 192A, 193A) Nurse Malloy repeated these criticisms on subsequent occasions. (R. 213A) Nurse Malloy allegedly would look for performance shortcomings, (R. 187A, 286A) and keep records of her needle stick attempts. (R. 198A) Nurse Malloy would treat her differently than others. (R. 188A) Clowes believed that Nurse Malloy inaccurately evaluated her. (R. 190A) It was Clowes' opinion that Nurse Malloy inaccurately assessed an event that Clowes acknowledged had occurred and for which Clowes received a written notice of deficiency. (R. 271A, 275A) Clowes also believed that Nurse Malloy treated her in a condescending manner, (R. 189A) and spoke to her rudely when Clowes misplaced a work slip. (R. 194A, 195A, 277A) Nurse Malloy told Clowes that others were complaining about her. (R. 189A, 191A-192A, 202A). Finally, Clowes believed that when Nurse Malloy and Nursing Supervisor Coffman reviewed her performance shortcomings at the November 5, 1987 conference, she was being harassed. Specifically, Clowes was upset that Nurse Malloy commented on Clowes' work on Floor 1C, because they had not worked there together. (R. 208A-210A)

In further support of her subjective perception that Nurse Malloy was "harassing" her, Clowes presented the testimony of her psychiatrist, Dr. Louis Hauber. Dr.

Hauber diagnosed Clowes' condition as a "major depressive disorder, single episode" and indicated that this was Clowes' first major depression. (R. 585A-586A) Dr. Hauber prescribed medicine to Clowes for her condition. (R. 583A)

Significantly, however, Clowes was unable to produce *any* evidence establishing that this alleged unfair treatment was because of her age. While Clowes claimed to have been treated differently than other members of the IV Team, including the many other IV Team nurses also over age 40, she offered no evidence that other members of the IV Team suffered from the same performance deficiencies. Moreover, while complaining that Nurse Malloy's evaluations were unfair, Clowes *admitted* that Ms. Malloy's evaluations contained numerous *positive* references to her work and admitted that Malloy's annual evaluation of Clowes' performance concluded that she had *satisfactorily* met the requirements of the position and recommended her for a salary increase. (R. 338A-344A)

On November 11, 1987, Clowes submitted a brief, handwritten list of goals designed to address her problems. (R. 804A, 1072A) Clowes never acted to implement these goals, however, since she took vacation from November 13 through 20, 1987. Beginning November 20, 1987, through December 22, 1987, Clowes requested that she be placed on sick leave. (R. 351A) Clowes never explained the nature of her illness to the Hospital, stating only that she was under a physician's care. During her sick leave, however, and while she was still being paid by the Hospital, Clowes began to work at the Concordia Nursing Home. (R. 351A)

Also on November 20, 1987, Clowes requested that she be transferred to temporary part-time status effective December 22, 1987 (the end of her sick leave) due to medical reasons. This request was granted by the Hospital. (R. 482A) Although the Hospital twice called Clowes to return to work in her part-time position, Clowes never returned to her position at the Hospital. (R. 351A, 353A)

At the time of Clowes' voluntary transfer to part-time status in November 1987, Clowes was under no threat of termination, demotion or formal discipline under the Hospital's progressive discipline system. (R. 810A) In fact, the Hospital was planning on a December meeting with Clowes to review her performance. (R. 1066A) Moreover, Clowes was not threatened with a loss of assignment or job responsibilities, nor was her pay cut. Indeed, Clowes' most recent evaluation had recommended an *increase* in her salary. (R. 1066a)

In addition, despite her allegations that Malloy was unfairly "harassing" her and subjecting her to intolerable working conditions, Clowes did not file a grievance under the Hospital's internal grievance procedure until months after her transfer to temporary part-time status. (R. 491A) Nor did Clowes present any evidence that she had requested a transfer off the IV Team prior to her voluntary change in status, or informed the Hospital that she would feel compelled to leave unless changes were made in the way she was supervised. Clowes simply abandoned her employment after accepting a job elsewhere.

In August, 1989, Clowes commenced her action against Allegheny Valley Hospital claiming that she was discriminated against and constructively discharged because of her age, in violation of the ADEA. Clowes also brought two pendent state law claims, one alleging age discrimination in violation of the Pennsylvania Human Relations Act and the other for intentional infliction of emotional distress. (R. 8A, 17A).

At the close of Clowes' case, the district court entered a directed verdict against Clowes dismissing her claim for intentional infliction of emotional distress. (R. 456A) Additionally, at the close of all the evidence, the district court chose not to entertain the pendent claim under the Pennsylvania Human Relations Act. (R. 950A) Therefore, the district court submitted only Clowes' ADEA claim to the jury. The jury returned a verdict by special interrogatories for Clowes. Specifically, the jury found that Clowes was constructively discharged from her employment with the Hospital and that age was a determining factor in the constructive discharge. (R. 124A-126A; 17a-18a) The Hospital filed a timely Motion for Judgment Notwithstanding the Verdict, or in the alternative, for New Trial. (R. 128A-133A) The district court summarily denied this Motion. (R. 124A)

Allegheny Valley Hospital filed a timely notice of appeal to the United States Court of Appeals for the Third Circuit. In its brief to the Third Circuit, the Hospital urged the jury verdict be reversed because there was insufficient evidence as a matter of law to support the

findings that Clowes had been constructively discharged and that age was a determining factor in the discharge.[3]

On April 23, 1993, the Third Circuit issued its opinion, reversing the judgment of the district court. (1a-6a) An Order Amending Slip Opinion, in which the court clarified a portion of its original opinion, was filed on May 27, 1993. (7a-8a)

In reversing the judgment of the district court, the Third Circuit noted initially that an objective test must be applied in determining whether an employee was constructively discharged from employment. (11a) The court further noted that the appropriate standard for review of such questions of reasonableness was subject to dispute. Significantly, however, the court specifically held that it need not resolve that question in the present case for, applying any standard, the jury's finding that Clowes was constructively discharged could not be sustained. (12a)

In reaching its decision, the court took note of several important undisputed factual matters:

> We first note that Clowes cannot rely on many of the factors commonly cited by employees who claim to have been constructively discharged. Clowes was never threatened with discharge; nor did her employer ever urge or suggest that she resign or retire. Similarly, Clowes's employer did not demote her or

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[3] Allegheny Valley Hospital also argued that the district court had committed reversible error, requiring a new trial, by admitting testimony concerning the treatment of other employees. The Third Circuit never reached this issue.

> reduce her pay or benefits. Clowes was not involuntarily transferred to a less desirable position, and her job responsibilities were not altered in any way. She was not even given unsatisfactory job evaluations but merely received ratings of "fair."
>
> It is highly significant that Clowes, prior to leaving her position with the hospital, never requested to be transferred to another position, never advised the hospital that she would feel compelled to leave if changes regarding the manner in which she was being supervised were not made, and did not even attempt to file a grievance until long after she had stopped working at the hospital. . . . (12a-13a) (citations and footnotes omitted).

While specifically recognizing and accepting the jury's conclusions that Nurse Malloy had treated Clowes unfairly and that Malloy's criticisms of Clowes were not entirely warranted, (14a) the circuit court observed that "Clowes has not brought to our attention a single case in which a constructive discharge has been found based solely upon [allegedly overzealous] supervision." (13a) The court then recognized that to prevent improper use of the ADEA as a means of thwarting an employer's nondiscriminatory efforts to insist on high standards, a discharge claim based solely on evidence of close supervision of job performance must be "critically examined." (13a) Based upon its examination of the evidence, the court held that "the evidence in this case was insufficient to show that Clowes was constructively discharged." (14a)

Clowes' petition for rehearing, and suggestion for rehearing *en banc*, was denied. (20a) Clowes, thereafter, petitioned this Court for a Writ of Certiorari to review the judgment and opinion of the court of appeals.

ARGUMENT

I. THIS CASE DOES NOT PRESENT A SPLIT BETWEEN THE CIRCUIT COURTS OF APPEAL CONCERNING THE PROPER STANDARD OF APPELLATE REVIEW FOR FINDINGS OF CONSTRUCTIVE DISCHARGE

Clowes' Petition for Certiorari is based primarily upon the existence of an alleged split among the circuit courts of appeal as to the proper standard of review to be applied to trial court findings of constructive discharge. This case, however, presents no such split. A review of the Third Circuit's opinion in this case, and in other cases involving constructive discharge, indicates that the Third Circuit has always applied the standard of review urged upon this Court by Clowes. Simply stated, no split exists between the holding of the Third Circuit in the instant case and the holdings of the First, Second, Fourth, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits[4] cited by

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[4] *Cozzola v. Codman & Shurtleff, Inc.*, 751 F. 2d 53, 56 (1st Cir. 1984); *Pena v. Brattleboro Retreat*, 702 F. 2d 322, (2d Cir. 1983); *Bristow v. Daily Press, Inc.*, 770 F. 2d 1251, 1252 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986); *Cortes v. Maxus Exploration Corp.* 977 F. 2d 195, 200 (5th Cir. 1992); *EEOC v. Delight Wholesale Co.*, 973 F. 2d 664, 669 (8th Cir. 1992); *Watson v. Nationwide Insurance Co.*, 823 F. 2d 360, 362 (9th Cir. 1987); *Hirschfeld v. New*

Clowes in her Petition for Certiorari. Petition for Certiorari (hereinafter "Cert. Petition") at 11-12.

A. The Unamended Preliminary Opinion Of The Third Circuit Has No Precedential Value

In its reported opinion, the Third Circuit specifically declined to answer the question now urged upon this Court by the Petitioner: what is the appropriate standard of review for trial court findings of constructive discharge? While acknowledging that some dispute exists concerning the proper standard of review for findings predicated upon an objective reasonable person test, (12a) the Circuit Court *specifically declined* to resolve that question in the present case and held, instead, that under any standard, the evidence presented by Clowes was insufficient as a matter of law to support the district court's judgment. (*Id.*) This Court should reject Clowes' disingenuous argument that the Third Circuit has resolved an issue, and created a split between the circuits, when the Third Circuit specifically, and unambiguously, declined to resolve that issue.

Clowes struggles mightily to create an issue for appeal where none in fact exists by relying *repeatedly* upon the circuit court's unamended and unreported April 23, 1993 slip opinion. Thus, while acknowledging that the amended opinion "ostensibly corrected [the Third Circuit's] standard of review error – or at least postponed it

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Mexico Corrections Dept., 916 F. 2d 572 (10th Cir. 1990); *Wardwell v. School Board*, 786 F. 2d 1554, 1557 (11th Cir. 1986).

for another day," Cert. Petition at 10, Clowes, nonetheless, maintains that "the opinion below aligns the Third Circuit with the Sixth Circuit as the only circuits to apply a *de novo* standard of review to constructive discharge claims." Cert. Petition at 11. Clowes, thus, urges this Court to grant her petition for certiorari to correct this perceived error "before other Circuits compound the error of the Sixth and Third Circuits and before other employment discrimination plaintiffs see their hard-won trial victories unfairly reversed." Cert. Petition at 9.

In their zeal to convince this Court to hear Clowes' case, counsel for the Petitioner have undoubtedly overstated the significance of the circuit court's initial unreported opinion. The unamended slip opinion of the court is not reported and, as such, is of *absolutely no* precedential value. *See* Chapter 5, IOP 5.6, Internal Operating Procedures of the United States Court Of Appeals For The Third Circuit. *See also U.S. v. Turley*, 891 F.2d 57, 60 (3d Cir. 1990). Nonetheless, Petitioner's counsel repeatedly cites to the unreported opinion, Cert. Petition at 9-11, and argues that the opinion constitutes a "holding that constructive discharge is a question of law, or at least a mixed question of law and fact, subject to *de novo* review in the appellate courts." Cert. Petition at 9. However, since the April 23, 1993, slip opinion is not published, and since the court of appeals specifically amended its opinion to clarify that it was *not* applying a *de novo* standard, there is absolutely no risk that litigants in the Third Circuit or elsewhere will be misled into applying the wrong standard of review to findings of constructive discharge. This Court, likewise, should not be misled into resolving an issue (*i.e.*, the proper standard

of review for findings of constructive discharge) that is not presented by the case *sub judice*.

Moreover, the fact that the circuit court issued an Order Amending Slip Opinion (7a-8a) prior to the publication of its final opinion is of no legal consequence. It is certainly within the court's discretion to amend an opinion prior to publication. Indeed, the slip opinions issued by this Court prominently contain a notice that "These opinions are subject to formal revision before publication in the preliminary print of the United States Reports." *See e.g.*, Opinions Announced June 28, 1993, 61 U.S.L.W. 4795 (June 28, 1993). For this Court to grant a petition for certiorari to review a circuit court decision which the circuit itself would not recognize as binding is certainly an ineffective use of the Court's resources. The Court should, therefore, decline Clowes' invitation to do so.

In sum, Clowes' misplaced reliance upon the unamended slip opinion and her misapprehension of the circuit court's Order Amending Slip Opinion, the Hospital submits, are insufficient bases upon which to grant a petition for writ of certiorari. We respectfully request, therefore, that the petition be denied.

B. In Other Published Decisions, The Third Circuit Court Of Appeals Has Applied The Standard Of Review That Petitioner Urges Upon This Court

Further undermining Clowes' perceived split between the circuits is the fact that the Third Circuit, in prior published cases, has clearly applied the standard of review which Clowes believes is correct. Interestingly, in

her lengthy string of citations concerning the appropriate standard of review, Cert. Petition at 12-13, Clowes does not cite these Third Circuit opinions, even though one of them is cited, with approval, in two of the decisions cited by Clowes. In both *Goss v. Exxon Office Systems Co.*, 747 F.2d 884 (3d Cir. 1984) – which is cited in the *Cortes v. Maxus Exploration* and *Bristow v. Daily Press* cases cited by Clowes – and *Levendos v. Stern Entertainment, Inc.*, 909 F.2d 747 (3d Cir. 1990), the court applied the "clearly erroneous" standard of review to the district court's findings of whether a constructive discharge had occurred. If, as Clowes argues, the Third Circuit has departed from this precedent and decided to apply a different standard of review to such determinations, it surely would have discussed, distinguished or overruled these prior cases. Indeed, in her Petition for Rehearing before the Third Circuit, Clowes argued precisely this point. The fact that the circuit court, *en banc*, declined Clowes' Petition for Rehearing is highly suggestive that the Court did not view the decision as a departure from its precedent. *See* Chapter 9, IOP 9.3.1, Internal Operating Procedure of the United States Court of Appeals for the Third Circuit.[5]

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[5] It is also significant that while allegedly aligning itself with the Sixth Circuit Court of Appeals, the Third Circuit neither cites nor discusses the two Sixth Circuit cases, *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987) and *Wheeler v. Southland Corp.*, 875 F.2d 1246 (6th Cir. 1989), that Clowes argues apply an incorrect standard. Surely, if the court of appeals were overruling its own precedent and adopting the Sixth Circuit's view, the court would have, at the very least, cited these cases in support of such a holding.

Since the Third Circuit, both in the case at bar and in prior cases, has applied the standard of review which Clowes maintains is the only correct standard, no split exists between the Third Circuit and the other circuits cited in Clowes' petition. Thus, it is not necessary for this Court to grant the Petition for Certiorari in order to "correct" the decision of the Third Circuit.

II. THE COURT OF APPEALS' DECISION DID NOT DEPRIVE CLOWES OF HER SEVENTH AMENDMENT RIGHT TO A JURY TRIAL

Petitioner also seeks this Court's review arguing that the Court's guidance is necessary to curb the "disturbing lack of deference to jury verdicts and a willingness to reverse jury findings, particularly in employment discrimination cases" by the circuit courts. Cert. Petition at 14. Clowes contends that this appellate "second guessing of jury verdicts," Cert. Petition at 15, deprives her and other employment discrimination plaintiffs of their Seventh Amendment right to a jury trial.

Contrary to Clowes' alarmist arguments, it is clear that the Third Circuit did no more than exercise its responsibility to assure the fidelity of its judgment to the controlling law. This responsibility is imposed by the Due Process Clause of the Fifth Amendment. *See Galloway v. United States*, 319 U.S. 372 (1943).

Clowes does not dispute that the proper test for determining whether an employee was constructively discharged from employment is an objective test examining whether "the conduct complained of would have the foreseeable result that working conditions would be so

unpleasant or difficult that a reasonable person in the employee's shoes would resign." *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1079 (3d Cir. 1992); *Goss v. Exxon Office Systems*, 747 F.2d at 887-888.

The Third Circuit's decision did nothing more than measure the evidence presented at trial against this standard. Contrary to Clowes' argument to this Court, Cert. Petition at 9, 11, the Third Circuit did *not* overrule the jury's credibility resolution and credit Malloy's testimony over Clowes' testimony. In fact, the court of appeals specifically recognized and accepted the jury's apparent conclusions that "Malloy treated Clowes unfairly and that her criticisms of Clowes were not entirely warranted." (14a) The court further noted, however, that Clowes had relied heavily on evidence regarding the subjective impact that the events in question had on her. (13a) The court properly disregarded such evidence, since, as the court noted, " 'the law does not permit an employee's subjective perceptions to govern a claim of constructive discharge.' " (13a-14a) (quoting *Gray v. York Newspapers, Inc.*, 957 F.2d at 1083)

Examining the record evidence in the exercise of its constitutional duty, the court listed a host of *undisputed* facts surrounding Clowes' decision to leave employment. Thus, the court noted that Clowes was never threatened with discharge nor did the Hospital ever urge or suggest that she resign or retire. The Hospital did not demote Clowes or reduce her pay and benefits. Clowes was not involuntarily transferred to a less desirable position and her job responsibilities were not altered in any way. Indeed, Clowes was not even given unsatisfactory job evaluations but merely received ratings of fair. (12a) The

court also found it highly significant that Clowes, prior to leaving her position, never requested to be transferred to another position or advised the Hospital that she would feel compelled to leave if changes were not made in the manner in which she was being supervised. As the court noted, since Clowes' complaint focused exclusively on the actions of one supervisor, it was significant that Clowes did not even request a transfer before deciding to resign. (13a n.6)

Thus, while specifically declining to decide the issue of the appropriate standard of review for a trial court finding of constructive discharge, the Third Circuit held that under any standard of review, the evidence adduced by Clowes at trial was "insufficient to show that Clowes was constructively discharged." (14a) In reaching this conclusion, the court certainly did not usurp the jury's proper function and deny Clowes her Seventh Amendment right to a jury trial. Rather, the court exercised its constitutional responsibility to assure the fidelity of its judgment to the controlling law. The circuit court's exercise of its oversight responsibility was not constitutionally infirm and, therefore, should not be disturbed by this Court.

CONCLUSION

For the reasons set forth above, Respondent Allegheny Valley Hospital respectfully requests the Court to deny the Petition for Writ of Certiorari of Janet G. Clowes.

Respectfully submitted,

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